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No. 76-1554

In the Supreme Court of the United States

OCTOBER TERM, 1977

GRANDVIEW BANK AND TRUST COMPANY, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 550 F. 2d 415. The order of the Board of Governors of the Federal Reserve System (Pet. App. A14-A18) is reported at 41 Fed. Reg. 12093.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1977. The petition for a writ of certiorari was filed on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the findings of the Board of Governors of the Federal Reserve System that

the acquisition of the newly established Commerce Bank of Grandview, N.A., by Commerce Bancshares, Inc., would not violate Missouri law prohibiting branch banking, would not have anticompetitive effects, would be consistent with the financial and managerial resources of the institutions concerned, and would serve the convenience and needs of the community.

2. Whether petitioner was denied due process in the administrative proceedings before the Board of Governors.

STATEMENT

After obtaining preliminary approval from the Comptroller of the Currency to charter a new national bank in Grandview, Missouri (R. 10-11, 252),[1] Commerce Bancshares, Inc. ("Bancshares"), a bank holding company within the meaning of the Bank Holding Company Act of 1956 (70 Stat. 133, as amended, 12 U.S.C. 1841 *et seq.*) applied to the Federal Reserve Board for approval under Section 3(a)(3) of the Act, 12 U.S.C. 1842(a)(3), to acquire the voting shares of the proposed Commerce Bank of Grandview, N.A. ("New Bank").[2] Petitioner, currently the only bank in Grandview, opposed the application and requested a hearing. The Board denied petitioner's request, noting that the record was sufficiently complete to enable it to render a decision[3] and that under Section 3(b) of the Act, 12 U.S.C.

[1]"R." refers to the record in the court of appeals.

[2]Under 12 U.S.C. 1842(a)(3), a bank holding company must obtain the approval of the Federal Reserve Board to acquire direct or indirect ownership or control of any voting shares of a bank if, after such acquisition, such company will directly or indirectly own or control more than 5 percent of the voting shares of such bank.

[3]The Missouri director of finance had approved Bancshares' proposal pursuant to Mo. Rev. Stat. §362.920 (1976 Supp.), and the Reserve Bank of Kansas City and the Comptroller of the Currency had submitted their memoranda recommending approval of Bancshares' application (Pet. App. A2, n. 3).

1842(b), it was not required to hold a hearing in cases where the Comptroller has recommended approval (Pet. App. A2).

The Board found that "consummation of the proposal would not eliminate any existing competition, nor does it appear that the proposal would have adverse effects on potential competition" and that the acquisition "may increase competition in this area through the introduction of another competitor" (R. 436-437).[4] The Board also found that Bancshares' and New Bank's financial and managerial resources and future prospects were satisfactory (R. 437). Since there is only one bank located in Grandview and the proposal would introduce into that area "an alternative source of a full range of banking services," the Board concluded that the proposal would serve the convenience and needs of the community (R. 437). Finally, the Board concluded that the proposed acquisition would not violate Missouri's law prohibiting branch banking because Bancshares and New Bank would not constitute a unitary banking operation (R. 438-439; footnote omitted):

> [New] Bank will be a separate corporation, with its own reserve requirements and capital stock and a loan limit based on such capital stock; that Bank will be managed by its own officers; that Bank's board of directors will be generally separate and independent from the boards of Applicant and of Applicant's subsidiaries; and that Bank will maintain its own separate books of account, issue its own distinctive checks, and use its own stationery. Applicant further states that Bank will be managed by its own local officers and that money

[4]The Board found the relevant banking market to be Clay, Jackson, and Platte Counties and the northern half of Cass County, Missouri, and Johnson and Wyandotte Counties, Kansas.

deposited at Bank will not be credited to the account of a depositor at any other banking subsidiary of Applicant and, conversely, any money deposited at any other banking subsidiary of Applicant will not be credited to the account of a depositor at Bank.

Accordingly, the Board concluded that "consummation of the subject proposal would be in the public interest and that the application to acquire [New] Bank should be approved" (R. 439-440).

On review the court of appeals affirmed in a thorough opinion (Pet. App. A1-A14).

ARGUMENT

Petitioner's arguments principally concern the application of settled legal principles to the particular facts of this case and do not warrant further review.[5]

1. Petitioner's major contention (Pet. 7) is that Bancshares is not a traditionally recognized bank holding company, that Bancshares' affiliates are doing business as a "unitary operation," and that the acquisition of New Bank would constitute *de facto* branch banking in violation of Missouri's branch banking laws.[6] Petitioner argues that

[5]Pursuant to Section 9 of the Act, 12 U.S.C. 1848, "[t]he findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive." Under this standard, appellate review of a decision of the Board is narrowly limited. *Alabama Association of Insurance Agents* v. *Board of Governors*, 533 F. 2d 224, 246 (C.A. 5); *Commerical National Bank of Little Rock* v. *Board of Governors*, 451 F. 2d 86, 90 (C.A. 8); *Northwest Bancorporation* v. *Board of Governors*, 303 F. 2d 832, 841 (C.A. 8); *First Wisconsin Bankshares Corporation* v. *Board of Governors*, 325 F. 2d 946, 948 (C.A. 7).

[6]Mo. Rev. Stat. §362.105.1(1) (1968) provides, in pertinent part, that "no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107 [which allows one

Whitney National Bank v. *Bank of New Orleans*, 323 F. 2d 290 (C.A. D.C.), reversed on other grounds, 379 U.S. 411, is controlling. In *Whitney*, the holding company's only subsidiaries were to be two banks, and the intention was to run them as a unitary operation. The transaction was simply a subterfuge for the establishment of a branch office. By contrast, Bancshares' affiliates are not operated as a single integrated bank. There is simply no showing that New Bank will, within the purview of 12 U.S.C. 36(f), operate to receive deposits, pay checks, or lend money on behalf of Bancshares' other subsidiaries. The Board's finding that the acquisition of New Bank would not be branch banking is supported by substantial evidence and the court of appeals' affirmance of that finding presents no conflict with *Whitney*.[7]

Petitioner also challenges the Board's conclusion that Bancshares' acquisition of New Bank will not result in a monopoly or have an anticompetitive effect. But petitioner points to no facts that rebut the Board's finding that the New Bank's "acquisition by [Bancshares] would not increase the concentration of banking resources in Missouri nor change [Bancshares'] rank among banking organizations in the

automobile banking facility]." Since national banks are prohibited from branching if a state bank in an identical situation would be so prohibited by state law, 12 U.S.C. 36, a national banking association in Missouri may not establish branches.

[7]There is no merit to petitioner's contention that New Bank will be controlled by officers and directors of Bancshares. Bancshares' application to the Board disclosed that the New Bank's permanent directors would be business and civic leaders from the Grandview area; the New Bank would be managed by its own supervisory personnel and officers appointed by its own Board of Directors, with the New Bank's employees free from control by management of Bancshares' banking subsidiaries. Cf. *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937, 942 (C.A. 9).

State" (R. 436). Instead, petitioner argues (Pet. 24-25) that in measuring competitive impact the Board should have looked only to Jackson County rather than to the six-county Kansas City area (see note 4, *supra*). The Federal Reserve Bank of Kansas City, however, analyzed the application and concluded that because of economic and demographic considerations "Jackson County is in no way isolated or separate from the rest of * * * urbanized Kansas City" and therefore that "the entire area encompassed by its six-county market definition constitutes the relevant banking market" (R. 326). This report was part of the record before the Board,[8] which considered and rejected petitioner's contrary contention. The Board's determination, which the court of appeals sustained as supported by substantial evidence, does not raise any issue warranting plenary review by this Court.

2. Petitioner contends that it was denied due process in that it was not allowed a hearing before the Board. There was, however, a hearing before the Comptroller of the Currency on Bancshares' application to acquire New Bank, and petitioner fully participated in that proceeding (R. 252, 266-269). Since the Comptroller approved the application, no further hearing was required before the Board. 12 U.S.C. 1842(b). See *Commercial National Bank of Little Rock* v. *Board of Governors*, 451 F. 2d 86, 90-91 (C.A. 8); *Bank of Boulder* v. *Board of Governors*, 535 F. 2d 1221, 1224-1225 (C.A. 10); *Kirsch* v. *Board of Governors*, 353 F. 2d 353, 356 (C.A. 6); *First Wisconsin Bankshares Corporation* v. *Board of Governors*, 325 F. 2d 946, 960 (C.A. 7).

Petitioner argues (Pet. 25-28) that it was improperly denied access to portions of the staff memoranda furnished

[8]12 C.F.R. 225.3(a) and 262.3 require that an application for approval by the Board be filed with the Federal Reserve Bank and that the Reserve Bank make such investigation as may be necessary.

to the Board.[9] But the few deletions from the staff memoranda involved ultimate staff recommendations on the application, legal and economic analyses, opinion and advice, and certain confidential information derived from an examination of Bancshares' subsidiary banks. The Board's practice of deleting such materials from the public record accords with the Freedom of Information Act[10] and the Board's published regulations,[11] and did not deny petitioner due process. *National Courier Association* v. *Board of Governors*, 516 F. 2d 1229, 1241-1243 (C.A. D.C.).[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]Petitioner also argues that there was a conflict of interest in that the Chairman of the Board of Bancshares was a director of the Kansas City Reserve Bank. However, the Reserve Bank acted only as an investigator and not as a decision-maker. See 12 C.F.R. 265.2(a)(3)(i)(*a*).

[10]5 U.S.C. 552(b)(4) and (8).

[11]12 C.F.R. 261.6(a)(2) and (3), 261.6(c).

[12]Similarly, the Board's confidential treatment of Bancshares' estimates or projections for the first three years of New Bank's operations, and of the list of loans made by Bancshares' subsidiary banks collateralized with over 5 percent of a bank's stock, was warranted. *Commercial National Bank of Little Rock* v. *Board of Governors*, *supra*, 451 F. 2d at 91.

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